**ESTHER TAN WOOI HONG & ORS.**

**v.**

**SAUJANA HOLDING SDN. BHD. & ORS.**

HIGH COURT MALAYA, PENANG
VINCENT NG J
[ORIGINATING SUMMONS NO: 24-1134-95]
25 JULY 1996

***CIVIL PROCEDURE:*** *Jurisdiction - Inherent jurisdiction of Court - Purchasers of apartment units unable to trace owner of land on which apartments were built - Onus on owner to apply for strata titles - Whether Court can grant property manager leave to apply for strata titles on purchasers' behalf - Principles applicable - Rules of the High Court 1980, O. 92 r. 4 - Strata Titles Act 1985, ss. 7 & 8*

The plaintiffs and the third and fourth defendants ('the owners') were purchasers of apartment units known as Bellane Court, developed by the first defendant ('Saujana') and completed in 1985. Under ss. 7 and 8 of the Strata Titles Act 1985, the onus was on Saujana, as registered proprietor of the land on which Bellane Court stood, to apply for strata titles in respect of the apartment units. Saujana became defunct in 1987. As the owners were left in the lurch with no one to receive the title deeds to the land from the chargee bank, effect a discharge of charge and apply for the strata titles, they applied for relief under s. 25(2) and para. 6 of the Schedule to the Courts of Judicature Act 1964 and the Court's inherent jurisdiction. In their application, the owners prayed for, *inter alia,* an order that a property manager be given leave to apply for the strata titles on their behalf, and other consequential orders.

**Held:**

**[1]** As there is no statutory body that has been conferred powers or imposed duties to apply for strata titles, by empowering the property manager to make the application for strata titles, the Court would not be assuming or usurping powers conferred on any other authority or body.

**[2]** Under O. 92 r. 4 of the Rules of the High Court 1980, the Court has inherent powers to make any order as may be necessary to prevent injustice or abuse of the process of Court. The Court, as an avenue of last resort for prayers for essential relief, and as the fountainhead of justice, ought not to take a position that it is not empowered to act solely because the Legislature has not clothed it with express power to grant the relief sought or that there is no indication of the principles upon which such jurisdiction should be exercised.

**[3]** The owners were also at liberty to apply under O. 45 r. 8 for a direction in the event of failure on the part of the property manager to make the application for strata titles.

*[Application allowed.]*

**Cases referred to:**
*Hart & Others v. Emelkirk Ltd. [1983] All ER 15* ***(foll)***
*Parker v. Camden London Borough Council [1985] 2 All ER 141* ***(dist)***
*Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd. [1992] 2 MLJ 434* ***(foll)***
*Motor Emporium v. Arumugam [1933] MLJ 276* ***(foll)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 25(2)
Rules of the High Court 1980, O. 45 r. 8, O. 92 r. 4
Strata Titles Act 1985, ss. 7, 8
Supreme Court Act 1981, s. 37

*For the plaintiffs - K. Balasundaram; M/s. Balasundaram & Co.*
*For the 2nd defendant - Rohaizat bin Othman; M/s. JB Lim & Assoc.*

## JUDGMENT

**Vincent Ng J:**

The facts and background of the application dated 22 December 1995 (Encl. 1) before me could shortly be stated as follows:

"Bellane Court" is a block of 15 apartments completed in 1985 and occupied the same year. The developer was the 1st defendant, Saujana Holdings Sdn. Bhd. (hereinafter referred to as 'Saujana'). The 13 plaintiffs and the 3rd and 4th defendants are purchasers of the apartment units. Saujana is also the registered owner of a piece of land known as Lot No. 302, Section 4, Georgetown, North East District, Penang.

Pursuant to ss. 7 and 8 of the Strata Titles Act 1985, the onus is on the proprietor of any alienated land upon which there is a completed building capable of being subdivided to apply for strata titles in respect thereof. For Bellane Court, the onus is therefore upon Saujana.

Saujana is now a defunct company. A check with the Registry of Companies shows that it has not filed any returns since 1987. It no longer is operating and does not have any office or place of business. Investigations reveal that Mr. Teoh Ming Teong, the secretary cum director as well as the prime mover of the company is no longer resident in Malaysia and is believed to have migrated to Australia (see paras. 8, 9 and 10 of supporting affidavit.)

Lot 302 has been charged to the 2nd defendant, Perwira Affin Bank Berhad. The debt has been settled and Perwira have tried to effect a discharge and return the title deeds, but has not been successful because Saujana has not responded in any manner to Perwira's solicitors' letters (See para. 5(b) of affidavit of Francis Tan).

All the apartment owners have now been left in a state of limbo as there is not body authorised or empowered to receive the title deeds from Perwira, effect a discharge of charge and more importantly, apply for the issuance of strata titles to the units in the building by the authorities.

What I am being asked is to exercise my discretion against this desperate situation.

As the plaintiffs' application was not resisted it became all the more imperative for me to explore the principles upon which I could grant the relief sought. In enclosure I, the plaintiffs had prayed for:

1. that M/s. C.A. Lim & Co., registered valuers and property managers who have been appointed by the abovenamed plaintiffs or the Senior Assistant Registrar, High Court, Penang be given leave to apply on behalf of the plaintiffs abovenamed to the Land Administrator, North East District, Penang for the building erected on Lot 2149, Seksyen 4, Georgetown, North East District, Penang to be sub-divided into separate parcels to be held under individual Strata Titles.

2. that the Senior Assistant Registrar, High Court, Penang be empowered to transfer the parcels in the said building to the beneficial owners thereof or their nominees and execute all such necessary instruments for the purpose of effecting the transfer or the parcels in the said building for and on behalf of the 1st defendant.

3. that the Registrar of Land and or such other relevant authority make such memorials in the Register as may be necessary to enable the beneficial owners or their nominees to be registered as the owners of the parcels belonging to them.

4. that the Registrar of Land Title and or such other relevant authority do prepare a register of strata titles by preparing, registering and issuing strata titles to all the beneficial owners or their nominees.

5. that all expenses to be incurred in the process of applying for strata titles for all the parcels in the building including solicitors' fees, M/s.

C.A. Lim & Co's fees or such other professional services as may be required be borne equally by each of the plaintiffs, 3rd and 4th defendants.

6. Such further or other relief as the Court considers just and proper.

***Jurisdiction of Court***

The application made herein is pursuant to s. 25(2) and para. 6 of the Schedule to the Courts on Judicature Act and also the inherent jurisdiction of the Court.

Section 25(2) of the Courts of Judicature Act provides:

> Without prejudice to the generality of sub-s. (1), the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating to the same.

Paragraph 6 of the Schedule provides:

> Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever.

The current application is in the nature of an appointment of a Receiver to protect or preserve property as was done in the case of *Hart & Others v. Emelkirk Ltd.* [1983] All ER 15 where Goulding J at p. 16 said:

> The action is brought to obtain a mandatory injunction against the defendant company to comply with the landlord's covenants and also for damages, and Counsel for the defendant company tells me that third party the proceedings are likely. But what I am asked to do today by the plaintiffs in each of the two actions dealing with adjoining blocks of flats is to appoint a named surveyor to receive the rents and profits of each property and all other moneys payable under any lease of any part thereof and to manage the property in accordance with the rights and obligations of the reversioner until trial or further order. I am asked to say that the person so appointed may give a good receipt for certain sums of money which one of the plaintiffs in each case has received as representing (or apparently representing) what remains of a reserve fund, intended under the leases to be built up by tenants' contributions, and that he (the receiver) may have resort to those funds in the course of management.
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> Now, I know of no precedent for such relief but I also know of no authority that forbids it under the provisions of the Judicature Acts now represented by the Supreme Court Act 1981, s. 37:

(1) The High Court may by order (whether interlocutory or final) ... appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so ...

It clearly appears to me to be just to appoint a receiver in this case because it is done to support the enforcement by the Court of covenants affecting property: of *Riches v. Owen* [1868] LR 3 Ch App 820. It is also convenient because, as I said, the properties are in a condition that demands urgent action.

I propose, therefore, in each action to appoint Mr. Trevor the nominated surveyor, in respect of whom an affidavit of fitness has been provided. I am assuming, of course, that his formal consent to act will be forthcoming. I will appoint him to receive the rents and profits and other moneys payable under the leases in the form of the notice of motion and to manage, in accordance with the rights and obligations of the reversioner, again as stated in the notice of motion, until trial or further order.

I think the Court has a wide jurisdiction to invest a receiver with such powers as the Court, in its discretion, thinks necessary for the preservation of the property the income of which he is to receive.

In the case of *Parker v. Camden London Borough Council* [1985] 2 All ER 141, the Court of Appeal in England rejected the application for an appointment of a Receiver. While recognising that s. 37 of the Supreme Court Act 1981 conferred upon the Court a general and unlimited jurisdiction to appoint a Receiver and Manager, it was obliged to exercise its discretion judicially and with due regard to the authorities binding on it. Accordingly, where Parliament had expressly conferred powers and imposed duties on a particular body such as a local authority, it was improper for the Court to assume those powers itself by appointing a manager who was thereby the Court's agent.

In this application, the Court is being asked to clothe and authorise Mr. Lim Chien Aun of M/s. C.A. Lim & Co. (see Encl. 2), Property Valuers & Managers who have been appointed by the plaintiffs, to make the application for issuance of strata titles. In doing so, the Court is moved to enforce the covenant affecting property since the sale and purchase agreements between the plaintiffs and Saujana provide that Saujana shall take all reasonable steps to obtain approval for sub-division and issuance of strata titles. In this respect, the instant case is similar to *Hart's* case. *Parker v. Camden London Borough Council* is inapplicable as in that case Parliament had specifically conferred power's and imposed duties on the local authority to maintain housing accommodation and provide heating. In respect of Bellane Court, there is no statutory body that has been conferred powers or imposed duties to apply for strata titles. In authorising and empowering Mr. Lim Chien Aun of M/s C.A.

Lim & Co to make the application for issuance of strata titles, the Court will not be assuming or ursurping powers conferred on any other authority or body.

In the case of *Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd.* [1992] 2 MLJ 434, Edgar Joseph Jr. J, (as he then was), had to consider whether a purchaser is entitled to an order that he be authorised by the chargor (proprietor) to tender the amounts due under the charge in the register in order to have the charge cleared off the register. In considering the Court's jurisdiction to make the order Edgar Joseph Jr. J said at p. 441:

> With regard to the extent of the Court's jurisdiction to make orders for the interim preservation of property the subject matter of any cause or matter, it is to be observed that the Courts of Judicature Act 1964 enacts (by para. 6 to the Schedule thereto) that the Court may do so, "by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* **or in any other manner whatever**' (emphasis provided).

Paragraph 6 to the Schedule to the Courts of Judicature Act 1964 is equivalent to the English s. 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 or its predecessor s. 25(8) of the Supreme Court of Judicature Act 1873. (See *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260. Speaking about the scope of the powers conferred by s. 45(1), Jessel MR in *Beddow v. Beddow* [1878] 9 Ch. D 89 said this at p. 93:

> That being so, it appears to me that the only limit to my power of granting an injunction is whether I can properly do so. For that is what it amounts to ... I have unlimited power to grantee an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles.

Also relevant protective measure of O. 29 r. 2(1) of the RHC which says:

> On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property the possession of a party to the cause or matter.

The case of *Chaplin v. Barnett* [1912] 28 TLR 256 shows that O. 29 r. 2(1) extends to every case in which the Court sees **that as between the parties something ought to be done for the security of the property** the subject matter of the action or, as to which, a question may arise in the action.

At p. 443 he concluded thus:

> I am therefore satisfied that I have jurisdiction by virtue of the combined effect of para. 6 of the Schedule to the Courts of Judicature Act 1964 O. 29 r. 2(1) of

the RHC, s. 206(3) of the Code and the principles enunciated by Lord Russell of Killowen in *Oh Hiam & Ors. v. Tham Kong* [1980] 2 MLJ 159, to grant to the purchaser an interlocutory mandatory order for preservation of the subject-matter of the suit in aid of enforcing alleged contractual obligations, provided it would be appropriate to do so.

***Has This Court Any Inherent Jurisdiction***

In *Motor Emporium v. Arumugam* [1933] MLJ 276, Acting CJ Terrel had occasion to say at p. 278:

> ... under s. 49(i) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, **every Court must have inherent jurisdiction to do justice between the parties,** and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered. (emphasis added)

I find that Terrel Acting CJ's words above are particularly apt and could be applied to the situation in which the owners of Bellane Court apartments now find themselves.

Edgar J also considered the Court's inherent jurisdiction in the *Kam Mah Theatre* case quoted above. At p. 446, he had this to say:

> Since settling this judgment in draft, my attention has been drawn earlier today by Counsel, for the purchaser, to the judgment of the Court of Appeal in England in *Astro Excito Navegacion SA v. Southland Enterprise Co. Ltd.. & Anor. (Chase Manhattan Bank NA intervening)* [1982] 3 All ER 335; [1982] QB 1248; [1982] 3 WLR 296 where it was held that under s. 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, replaced by s. 37 of the Supreme Court Act 1981, which is equivalent to, though not as widely drawn, as our para. 6 of the Schedule to the Courts of Judicature Act 1964), the Court has jurisdiction, where it appears just and convenient to do so, to order interim relief by granting an interlocutory mandatory injunction to enforce a contractual obligation before trial. In so holding, the Court of Appeal had followed *Smith v. Peters* [1875] LR 20 Eq 511 in which it was held that the Court has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing of the cause.
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> The cases of *Astro* [1982] 2 All ER 335, [1982] QB 1248; [1982] 3 WLR 296 and *Smith v. Peters* [1875] LR Eq 511, were cited with approval by the Federal Court in *TR Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd.* [1985] 2 MLJ 45 wherein reference was also made to the provisions of O. 92 r. 4 which reminds the High Court of its inherent powers to make any orders as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. I am fortified in the conclusion at which I have arrived by these authorities.

Under O. 92 r. 4 the High Court has inherent powers to make any order as it may be necessary to prevent injustice or prevent an abuse of the process of Court. And in my view, the Court, as an avenue of last resort for prayers of essential reliefs, and as the fountainhead of justice ought not to countenance taking a position that displays its own utter impotence due solely to the fact that the legislature has not clothed it with express empowerment to grant the relief sought or any indication of what principles such jurisdiction should be exercised.

In the event 1 allowed prayers 1 to 5 of the plaintiffs' application dated 22 December 1995 under Encl l. It is also ordered that plaintiffs shall have liberty to apply under O. 45 r. 8 for a direction in the event of failure on the part of Mr. Lim Chien Aun of M/s C.A. Lim & Company to make the application for issuance of strata titles.

*Reported by Anne Khoo*